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Dual Drilling Co. v. Mills Equipment Investments, Inc. - A Statement About Conversion or a Statement About the Concept of Fault?

Mark Fernandez

Dual Drilling Co. v. Mills Equipment Investments, Inc.—A Statement About Conversion or a Statement About the Concept of Fault?

I. INTRODUCTION

The common law tort of conversion provides a means of protecting one's possessory and ownership interest in chattels.[1] Conversion is an intentional tort, but the requisite intent need not include a desire to harm the plaintiff's possessory or ownership interest.[2] The intent required is merely a volition to exercise control over a chattel which is *in fact* contrary to another's possessory or ownership interest. Accordingly, a reasonable mistake by the defendant will not serve as a defense since error as to fact or law does not negate the requisite intent.[3] This characteristic has lead some scholars to classify common law conversion as a strict liability tort since neither conscious wrongdoing nor negligence is necessary.[4]

In *Dual Drilling Co. v. Mills Equipment Investments, Inc.*,[5] the Louisiana Supreme Court jettisoned the common law tort of conversion from Louisiana. Since 1886 the Louisiana courts have recognized the common law tort of conversion as a theory of recovery.[6] However, according to the court, what exists

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1. Restatement (Second) of Torts §222A (1965).
2. Restatement (Second) of Torts §224 (1965).
3. *Id.*
4. A useful distinction may be made between strict liability and absolute liability. In both absolute liability and strict liability personal knowledge of an existing risk is irrelevant. However, strict liability, like negligence, incorporates a risk/utility balance since there must be an unreasonable risk of harm created either by the actor or something in his custody. In contrast, absolute liability does not involve a risk/utility balance. When absolute liability is imposed, it is of no consequence that the activity might present a reasonable risk of harm; the defendant is liable if there is damage. *See* Thomas C. Galligan, Jr., *Strict Liability in Action: The Truncated Learned Hand Formula*, 52 La. L. Rev. 323, 324-30, 335-38 (1991). *See generally* Frank L. Maraist & Thomas C. Galligan, Jr., Louisiana Tort Law §§1-8, 1-9 (1996 & Supp. 1999) [hereinafter *Louisiana Tort Law*].

Based on the above distinction, the common law tort of conversion may be considered an absolute liability offense since it does not require that an unreasonable risk of harm exist. Additionally, the minimal requisite level of intent (intent to merely do the act) effectively negates any defense of mistake. *See* Robert L. Morris, *Movable Property—Remedies of One Out of Possession of Movables*, 37 Tul. L. Rev. 843, 845 (1963); A.N. Yiannopoulos, *Real Actions in Louisiana and Comparative Law*, 25 La. L. Rev. 589, 692, 694 (1965); A.N. Yiannopoulos, Property §346 at 673, *in* 2 Louisiana Civil Law Treatise (3d ed. 1991 & Supp. 1999). Nevertheless courts and commentators often describe conversion as a strict liability offense. Indeed the *Dual Drilling* court seems to use the terms strict liability and absolute liability interchangeably. When the court uses the term strict liability in describing common law conversion, it should be understood as absolute liability. However, this article will use the term strict liability in place of absolute liability to avoid confusion.

5. 721 So. 2d 853 (La. 1998)
6. *See* Chamberlain v. Worrell, 38 La. Ann. 347 (1886). For notable cases in which Louisiana courts have applied common law conversion principles *see generally*: Quealy v. Paine, Webber, Jackson & Curtis, Inc., 475 So. 2d 756 (La. 1985); Importsales, Inc. v. Lindeman, 92 So. 2d 574 (La. 1957); Lincecum v. Smith, 287 So. 2d 625 (La. App. 3d Cir. 1973), *writ refused*, 290 So. 2d 904 (La.

in Louisiana is not the common law tort of conversion but a delictual action based on Article 2315.[7] The chief distinction between the delictual action and the common law tort is that the former requires a showing of fault while the latter does not. The court suggests that the strict liability characteristic of common law conversion renders the tort incompatible with the Article 2315 requirement of fault. Additionally, the court describes the common law tort as unnecessary in Louisiana since movables are adequately protected under existing civilian remedies such as the aforementioned delictual action, the revendicatory action, and a quasi-contractual action for unjust enrichment.[8]

In holding that the strict liability characteristic of common law conversion renders it incompatible with Article 2315, the supreme court implies that Article 2315 contemplates liability only for acts of negligence and intentional misconduct. Yet, the court recognizes strict liability as an example of non-blameworthy conduct which *nevertheless* constitutes fault under Article 2315.[9] In this way the court contradicts itself, for if strict liability is a type of fault, why should the strict liability feature of common law conversion render it incompatible with Article 2315? Because of this ambiguity, the *Dual Drilling* decision might be read as suggesting that Article 2315 imposes liability only for acts of negligence and intentional misconduct while impositions of strict liability are justified apart from Article 2315. However, such a reading would conflict with previous judicial interpretations of Article 2315 fault.[10] More importantly, such a reading would frustrate the civilian methodology traditionally employed in defining fault under Article 2315.

This writer submits that *Dual Drilling* should be understood as maintaining an expansive concept of fault consistent with jurisprudence. The ambiguity created in the decision should be viewed as the result of an oversimplification by the supreme court of a technique long employed by the Louisiana courts. This

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1974); Davis v. American Marine Corp., 163 So. 2d 163 (La. App. 4th Cir.), *writ refused*, 165 So. 2d 483 (1964).

7. La. Civ. Code art. 2315 provides in part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

8. *Dual Drilling Co.*, 721 So. 2d at 856 (citing A.N. Yiannopoulos, Property §§350, 356, 357, *in* 2 Louisiana Civil Law Treatise (3d ed. 1991 & Supp. 1998)). According to Professor Yiannopoulos, the revendicatory action is an innominate real action based on Louisiana Civil Code article 526 for the recognition of one's ownership of a movable and recovery of the movable. By virtue of Louisiana Civil Code article 530 and the presumption which it creates that a present possessor of a corporeal movable is the owner, both possessors and owners of movables may avail themselves of the revendicatory action. The quasi-contractual action is based on the Civil Code rules governing the payment of a thing not due. Using these codal provisions, the Louisiana courts have fashioned a general remedy for unjust enrichment. The delictual action is based on Louisiana Civil Code article 2315 and predicated on the fault of the defendant.

9. *Dual Drilling Co.*, 721 So. 2d at 857 (citing *Louisiana Tort Law* §1-2, at 3).

10. *See* Veazey v. Elmwood Plantation Assoc. Ltd., 650 So. 2d 712, 718 (La. 1994) (Article 2315 and the civilian concept of fault "includes more than just negligence; it extends the gamut from strict liability to intentional torts."); Langlois v. Allied Chem. Corp., 249 So. 2d 133, 137 (La. 1971) ("Fault is not limited to moral wrongs but encompasses many acts which are merely forbidden by law."). *See also* Butler v. Baber, 529 So. 2d 374 (La. 1988); Inabnet v. Exxon Corp., 642 So. 2d 1243 (La. 1994).

technique or methodology is the practice of defining Article 2315 "fault" by analogy with other statutory provisions. In order to illustrate how the courts have employed this technique, this article explores in limited scope the development of Louisiana's ultrahazardous activity doctrine in which the Louisiana Supreme Court held that the absolute obligations imposed by the vicinage articles were exemplary of fault. Finally, this article examines the characteristics of civil law conversion—the Louisiana delictual counterpart to the common law tort of conversion.[11]

II. *DUAL DRILLING*

A. *Facts*

In October 1990, partners Travis Vollmering and Atlas Iron and Metal Company agreed to purchase an inoperative offshore oil rig (designated "Rig 16") for scrap from Dual Drilling Company. The rig was located at the Tidex shipyard in Amelia, Louisiana, together with other Dual Drilling rigs and equipment. Subsequent to the sale, Atlas engaged Southern Scrap Recycling to dismantle Rig 16. Vollmering visited the shipyard with a Southern employee to identify for him each item that was to be dismantled. Vollmering mistakenly identified an adjacent rig component (part of Rig 25) as part of his property and instructed the Southern employee to dismantle it. Before the Southern employees returned to dismantle the equipment identified by Vollmering, a Dual Drilling employee arrived at the shipyard and marked "Do Not Cut" on all three sides of Rig 25 with fluorescent orange spray paint. As instructed by the partnership, Southern employees began cutting Rigs 16 and 25. A shipyard worker noticed Southern employees cutting Rig 25 and told them that it was not to be cut. Southern employees continued to cut despite the warning. Dual Drilling thereafter filed suit against Vollmering, Atlas and Southern for conversion of Rig 25.[12] The trial court found that Southern knew or should have known that Atlas was not the owner of the Rig 25 cement package and held them liable for conversion.[13]

On appeal, Southern argued that by applying common law conversion principles, the trial court erred in holding them liable without fault.[14] According to Southern, since Article 2315 imposes liability only upon proof of fault, negligence must be shown. Additionally, Southern argued that the trial court erred in concluding that Southern knew or should have known that the Rig 25 cement package was not part of the property sold to Atlas. On the facts of the case, the appellate court considered Southern's argument—that common law conversion was at odds with Article 2315—irrelevant since the record clearly demonstrated that Southern acted negligently in causing damage to Rig 25. Nevertheless, the

11. *Dual Drilling Co.*, 721 So. 2d at 857 n.3.
12. *Id.* at 855.
13. *Id.* at 856.
14. *Dual Drilling Co. v. Mills Equip. Inv., Inc.*, 705 So. 2d 1246, 1256 (La. App. 4th Cir. 1998).

appellate court addressed the argument. Relying on *Louisiana State Bar Association v. Hinrichs*,[15] the appellate court ruled that in Louisiana neither proof of conscious wrongdoing nor proof of negligence was necessary to succeed in an action for conversion.[16]

B. *Conversion Versus Delictual Action for Wrongful Dispossession*

The Louisiana Supreme Court granted writs to determine whether Louisiana law provided for a tort of conversion akin to that of the common law.[17] The court concluded that common law conversion was unnecessary in Louisiana since "civilian remedies amply protect personal and real rights in movable property. . . ."[18] Furthermore, the court held that the strict liability feature of common law conversion renders the tort incompatible with the Article 2315 requirement of fault. In consequence, the court distinguished the common law tort of conversion from the corresponding civil law delictual action.[19] According to the court:

> [Common law conversion is] not to be confused with the civil law tort of conversion. In common law jurisdictions, conversion is an intentional wrong giving rise to strict liability. . . . Prominent legal scholars agree that tortious activity is only established upon proof of fault under La. Civ. Code art. 2315 *as opposed to the common law allowance of strict liability*. . . .[20]

This statement implies that strict liability is incompatible with Article 2315. However, the court states a few sentences later that strict liability *nevertheless* constitutes fault under Article 2315.[21] Thus, the court's message is unclear. Notably, a subsequent statement in the opinion suggests that the court may not have been making such a broad statement about the concept of fault: "the [strict] liability which characterizes conversion is in direct conflict with Article 2315 of the Louisiana Civil Code and the principle that *liability for wrongful dispossession*

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15. 486 So. 2d 116 (La. 1986).

16. The court stated:

> The intent required for a conversion is not necessarily that of conscious wrongdoing. It is rather an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights. A mistake of law or fact is no defense. Persons deal with the chattels or exercise acts of ownership over them at their peril, and must take the risk that there is no lawful justification for their acts.

Dual Drilling Co., 705 So. 2d at 1257 (citing *Hinrichs*, 486 So. 2d at 121).

17. *Dual Drilling Co.*, 721 So. 2d at 854.

18. *Id.* at 856. *See supra* note 8. *See generally* Robert L. Morris, *Movable Property—Remedies of One Out of Possession of Movables*, 37 Tul. L. Rev. 843 (1963); A.N. Yiannopoulos, *Real Actions in Louisiana*, 25 La. L. Rev. 589 (1965); A.N. Yiannopoulos, Property §§350, 356, 357, *in* 2 Louisiana Civil Law Treatise (3d ed. 1991 & Supp. 1999).

19. *Dual Drilling*, 721 So. 2d at 857.

20. *Id.* at 857 n.3 (citation omitted, emphasis added).

21. *Id.*

rests on fault."[22] Because this statement focuses principally on wrongful dispossession liability, it does not suggest that *all* impositions of strict liability are in conflict with Article 2315. However, the court does not explain why strict liability may not be imposed in cases of wrongful dispossession.

The supreme court relied on the commentary of Professor Yiannopoulos for the proposition that common law conversion should not be recognized in Louisiana.[23] Professor Yiannopoulos claims that the availability of the revendicatory action, the quasi-contractual theory of unjust enrichment, and the fault based delictual action for damages renders common law conversion unnecessary. He explains that the tort of conversion developed of necessity at common law since chattels did not benefit from the protection afforded by real actions such as the revendicatory action extant in the continental legal system. Additionally, the conversion action was necessary at common law since the conservative English courts were historically unwilling to allow recovery on quasi-contractual theories. Professor Yiannopoulos states that a civil law system does not require the protection of the conversion action since real actions are available and quasi-contractual awards are frequently granted.[24] Finally, Professor Yiannopoulos states that common law conversion should not be recognized in Louisiana since "conversion is an intentional wrong giving rise to strict liability" whereas at civil law "the corresponding delictual action is based on the fault of the defendant."[25] This statement, like that of the *Dual Drilling* court, suggests an incompatibility between strict liability and the Article 2315 requirement of fault. However, unlike the supreme court, Professor Yiannopoulos does not suggest as a general rule that "tortious activity is only established upon proof of fault." Apparently, the conflict that Professor Yiannopoulos points out is limited to the delictual protection of *movables*. He does not suggest that Article 2315 in all cases demands at minimum proof of negligence.

Dual Drilling is not the first decision to challenge the viability of common law conversion in Louisiana. In *Lincecum v. Smith*,[26] the plaintiff brought an action for conversion arising from the destruction of her dog. The defendant found the dog in his neighborhood and took possession of it. The court found that the defendant had made minimal attempts to locate the owner before taking the dog away with him to Baton Rouge. While in Baton Rouge the defendant brought the dog to a veterinarian for treatment of an eye infection. The veterinarian informed the defendant that the dog was almost blind and that a treatment costing over $200

22. *Id.* (emphasis added).

23. *See* A.N. Yiannopoulos, Property §357, at 691, *in* 2 Louisiana Civil Law Treatise (3d ed. 1991 & Supp. 1999); A.N. Yiannopoulos, *Work of the Appellate Courts—1975-1976*, 37 La. L. Rev. 317, 330 (1976); A.N. Yiannopoulos, *Real Actions in Louisiana*, 25 La. L. Rev. 589, 692, 694 (1965).

24. *But see* Lusco v. McNeese, 86 So. 2d 226, 228 (La. App. 1st Cir. 1956) (Tate J. holding that real actions are not applicable to movables).

25. A.N. Yiannopoulos, Property §357, at 691, *in* 2 Louisiana Civil Law Treatise (3d ed. 1991 & Supp. 1999).

26. 287 So. 2d 625 (La. App. 3d Cir.), *writ refused*, 290 So. 2d 904 (La. 1974).

would not likely cure the dog. On the advise of the veterinarian, the defendant ordered the dog put to sleep.

Finding that he did all that was expected of him under the circumstances, the trial court held that the defendant did not act negligently in putting the dog to sleep. Accordingly, the court ruled that it was not the fault of the defendant that the plaintiff suffered her loss. In reversing the trial court, the third circuit noted that the "intent required [to satisfy the tort of conversion] is not necessarily a matter of conscious wrongdoing. It is rather an intent to exercise a dominion . . . over the goods which is *in fact* inconsistent with the plaintiff's rights."[27] Furthermore, the appellate court noted that under the circumstances the defendant had acted negligently in not making greater efforts to locate the owner of what was obviously a very expensive dog before putting it to sleep.

The Louisiana Supreme Court refused writs stating, "[t]he result is correct. See Civil Code Article 2315."[28] In a concurring statement Justice Barham stated: "Trover and conversion are common law remedies. The civil law of Louisiana does not follow the common law and especially does not follow these common law concepts. Recovery is had for all damage caused by the fault of another under Civil Code Article 2315."[29] As in *Dual Drilling* the court's statement is ambiguous. Does the above statement simply suggest that Article 2315 can not impose strict liability *for the protection of movables* or does the statement suggest a fundamental incompatibility between the Article 2315 requirement of fault and strict liability? It is submitted that the former is the proper view for reasons discussed below.

III. DEFINING FAULT—AND WHAT DEFINING MEANS

As defined in Black's Law Dictionary, *fault* entails some measure of imprudence on the part of an actor resulting from inattention, incapacity or perversity.[30] Using this definition, if tort liability were imposed only for damage caused by the *fault* of another then liability would be imposed only when a tortfeasor had acted negligently or acted with an intent to cause damage. In a similar manner Article 2315 obliges persons who are at fault in causing damage to repair it.[31] However, the Louisiana courts have historically incorporated a broader definition of fault than that described above.[32] Indeed, Louisiana's jurisprudence informs that strict liability is a type of fault.[33] Hence, the Louisiana application of fault in Article 2315 may be described simply as a legal *determination* of whether

27. *Lincecum*, 287 So. 2d at 628 (citing William L. Prosser, Handbook of the Law of Torts §83-4 (3d ed. 1964)) (emphasis added).

28. Lincecum v. Smith, 290 So. 2d 904 (La. 1974).

29. *Id.*

30. Black's Law Dictionary 608 (6th ed. 1990).

31. *See supra* note 7.

32. *See* authorities cited *supra* note 10 and text accompanying note 48.

33. Loescher v. Parr, 324 So. 2d 441, 446 (La. 1975) (Tate J. classified the strict liability imposed by La. Civ. Code art. 2317 as a type of fault called "legal fault").

or not one will be made to repair damage caused by his actions—regardless of whether the tortfeasor's damage causing conduct may be considered imprudent.

There are formidable arguments against equating strict liability with Article 2315 fault. Doing so might allow for unrestrained judicial expansion of "faultless" torts and strict liability under Article 2315. In fact, the supreme court in *Langlois v. Allied Chemical Corp.*[34] and *Loescher v. Parr*[35] took advantage of the flexibility that an expansive view of fault allows in developing Louisiana's products liability law and the state's ultrahazardous activity doctrine. Furthermore, there are formidable arguments against *ever* imposing strict liability. The most compelling is that imposing liability in the absence of blameworthiness (that is, liability in the absence of negligence or intentional wrongdoing) provides no beneficial deterring effect. As Professor André Tunc points out, the deterrent effect of tort law is not furthered if liability is imposed in situations where the defendant acts as a reasonable man but nevertheless must answer for the damage he caused.[36] Professor Stig Jørgensen notes that the "idea of prevention or deterrence is the functional . . . counterpart of the idea of fault."[37] Yet another reason for not imposing liability for non-blameworthy acts is to prevent tort law from becoming social insurance. According to Professor Wex Malone, "[t]he more often courts elect to depart from the fault concept, the more sharply looms the obvious similarity between the damage claim and other forms of social insurance."[38]

Though these commentators present a strong case against the imposition of strict liability, their comments are more properly addressed to the legislature rather than the courts. This is so because the Louisiana courts have not imposed strict liability based on Article 2315 alone with the exception of the common law torts of trespass to chattel and conversion.[39] When strict liability has been imposed, it is justified on the basis of statutory provisions apart from Article 2315, such as Articles 667, 2318, and 2322 as they existed prior to the 1996 tort reform legislation.[40] Furthermore, defining Article 2315 merely as a source of tort

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34. 249 So. 2d 133 (La. 1971).

35. 324 So. 2d 441 (La. 1975).

36. André Tunc, *Fault: A Common Name for Different Misdeeds*, 49 Tul. L. Rev. 279, 280-83 (1975).

37. Stig Jørgensen, *Liability and Fault*, 49 Tul. L. Rev. 329, 332 (1975). Professor Jørgensen concludes that strict liability should be considered a type of fault:

> [T]he old system of fault based on the method of balancing of interests, characteristic of the doctrine of wrongfulness, and the principles of the *bonus pater familias* are antiquated with regard to their theoretical foundations and likewise are unable to answer the requirements of the modern community. Instead, the analysis of fault must be regarded as a special application of the general principles on the sources of law.

Id. at 335.

38. Wex S. Malone, *Ruminations on Liability for the Acts of Things*, 42 La. L. Rev. 979, 988 (1982) (Professor Malone appears to be equating fault with blameworthiness).

39. *But see* Kent v. Gulf States Util. Co., 418 So. 2d 493 (La. 1982) (Some commentators have interpreted this decision as suggesting that the ultrahazardous duty doctrine and its imposition of absolute liability fall under Article 2315 alone and not by analogy to other code articles.)

40. La. Civ. Code art. 667 (1870) provided: "Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty

responsibility for acts of negligence and intentional wrongdoing would be unwise since it overlooks the role of Article 2315 as a veritable porthole through which all tort responsibility flows by analogy with other articles.

Historically, Louisiana courts have defined what constitutes fault under Article 2315 by analogy with other code articles. For example, reading Article 2316 *in pari materia* with Article 2315 informs that fault includes "negligence, imprudence or . . . want of skill."[41] Fault also includes strict liability, for according to the supreme court in *Loescher*, Article 2317, though not requiring proof of negligence, exemplifies fault. Indeed, *Loescher* held that all of the articles following Article

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of enjoying his own, or which may be the cause of any damage to him."

La. Civ. Code art. 2318 (1870) provided in part: "The father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons."

La. Civ. Code art. 2322 (1870) provided: "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

Following La. Acts 1996, 1st Ex. Sess., No. 1 and La. Acts 1996, Ex. Sess., No. 3 [hereinafter 1996 tort reform legislation] in which Articles 660, 667, 2321, 2322, 2323, and 2324(B) and (C) were amended and Article 2317.1 enacted, the above articles (with the exception of Article 2318) were modified to require proof of negligence.

La. Civ. Code art. 667 provides in part:

> Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. *However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.*

(emphasis added).

La. Civ. Code art. 2318 provides in part:

> The father and the mother and, *after the decease of either, the surviving parent,* are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons.

(emphasis added).

La. Civ. Code art. 2322 provides in part:

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction. *However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.*

(emphasis added).

For a discussion of what remains of strict and absolute liability following the enactment of the 1996 tort reform legislation *see Louisiana Tort Law* §§ 1-8. 1-9; Frank L. Maraist & Thomas C. Galligan, Jr., *Burying Caesar: Civil Justice Reform and the Changing Face of Louisiana Tort Law*, 71 Tul. L. Rev. 339 (1996).

41. Langlois v. Allied Chem. Corp., 249 So. 2d 133, 136 (La. 1971). La. Civ. Code art. 2316 provides: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

2315 in Chapter 2, Title 5 of Book 3 serve as "amplifications as to what constitutes 'fault'."[42] Yet, nowhere is the practice of defining fault by analogy with other articles more exemplary than in the development of Louisiana's ultrahazardous activity doctrine. The dynamic nature of Article 2315 allowed the courts to incorporate the absolute obligations imposed by Articles 667-669 (commonly referred to as the vicinage articles) into tort law reasoning that these articles serve as examples of fault. Indeed, the development of this tort doctrine beyond its property law roots might not have been possible had Article 2315 and its concept of fault been limited to mere negligence and intentional wrongdoing.

IV. THE ULTRAHAZARDOUS ACTIVITY DOCTRINE AND ARTICLE 2315

The development of the ultrahazardous activity doctrine in Louisiana has its roots in the vicinage articles. These provisions establish what might be considered predial servitudes limiting the scope and extent of the right of ownership in immovable property.[43] In particular, Article 667 imposes upon a proprietor an obligation to not make any work on his land which might deprive his neighbor of the liberty of enjoying his own land or causing him any damage. By 1964 it was well settled that this obligation imposed strict liability and that damages might be awarded pursuant to that article.[44] However, a question existed at the time as to whether the Article 667 action was an action *ex contractu* or *ex delicto*.[45]

The fourth circuit in *Gulf Insurance Co. v. Employers Liability Assurance Corp.*[46] faced this question in determining whether the Article 667 action was subject to a ten or a one year liberative prescription period. While noting that some earlier cases had recognized the Article 667 action as quasi-contractual in nature, the court classified the action as one in tort relying on the commentary of Professor Ferdinand Stone, in particular, that Article 667 exemplifies fault under Article 2315.[47] According to Professor Stone, Article 2315 is broad enough to include intentional wrongdoing, negligence, strict and vicarious liability. Furthermore, "fault" as the term is used in Article 2315 is a dynamic concept:

> [F]ault is the mirror of our times: what we, people of Louisiana, decide fault to be, that is fault. As such, fault is a fluid term definable only with respect to its surroundings and thus, with the concept of fault, we can

42. Loescher v. Parr, 24 So. 2d 441, 445 (La. 1975).

43. For a discussion of the legal nature of the vicinage articles *see* Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 233, 82 So. 206 (La. 1919); Ferdinand Fairfax Stone, *Tort Doctrine in Louisiana: The Obligations of Neighborhood*, 40 Tul. L. Rev. 701 (1966); A.N. Yiannopoulos, *Civil Responsibility in the Framework of Vicinage: Arts. 667-69 and 2315 of the Civil Code*, 48 Tul. L. Rev. 195 (1974).

44. *See* Gulf Ins. Co. v. Employers Liab. Assurance Corp., 170 So. 2d 125 (La. App. 4th Cir. 1964).

45. *Id* at 126-27.

46. 170 So. 2d 125 (La. App. 4th Cir. 1964).

47. *Id.* at 127.

> incorporate into our tort law a new situation without changing our definition of fault. . . .[48]

Stone points to Articles 667, 2318, and 2322 as examples of legislative impositions of liability without negligence. Though imposing liability for what is perhaps non-blameworthy conduct, these articles nevertheless exemplify Article 2315 fault. Stone classifies this non-negligent type of fault as "legal fault."[49] Some consider liability founded upon this theory as "liability without fault."[50]

According to Stone, whether one is at fault may be answered according to a definite method.[51] First, the courts should refer to the Louisiana Civil Code and its provisions regarding the responsibility of certain persons or those engaged in certain types of activity in search of illustrations of fault.[52] The courts must refer to the state constitution and other acts of the legislature, as well as the multitude of municipal ordinances and regulations, in search of standards of conduct similarly illustrative of fault.[53] Having exhausted positive law, the unprovided-for-case must be decided upon natural law, reason and received usages.[54] This concept of fault and the process by which the courts of Louisiana may elucidate it, gained acceptance by the Louisiana Supreme Court in *Langlois v. Allied Chemical Corp.* wherein the court employed this methodology holding that the vicinage articles—though imposing liability without negligence—were illustrative of Article 2315 fault.[55]

In *Langlois*, the plaintiff, Emanuel Langlois, was a fireman employed by the Baton Rouge Fire Department who responded to an emergency at the Delta Southern Tank facility. During the five minute interval in which the firemen (including plaintiff) remained at Delta, they encountered a noxious gas in the form of a haze or fog coming from an unknown source. In fact, the gas had escaped from the bordering Allied Chemical Corporation plant when a pipe carrying gas from a reactor ruptured. As a result of the exposure, the plaintiff sustained injuries.

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48. Ferdinand F. Stone, Louisiana Tort Doctrine §60, at 84 *in* 12 Louisiana Civil Law Treatise (1977).

49. Ferdinand F. Stone, *Tort Doctrine in Louisiana: The Concept of Fault*, 27 Tul. L. Rev. 1, 19 (1952). *See also* Ferdinand F. Stone, *Touchstones of Tort Liability*, 2 Stan. L. Rev. 259, 283 (1950).

50. *See* authorities cited *supra* note 49.

51. Ferdinand F. Stone, *Tort Doctrine in Louisiana: The Materials for the Decision of a Case*, 17 Tul. L. Rev. 159, 209-15 (1942).

52. *Id.* at 209.

53. *Id.* at 212.

54. *Id.* at 214. For a particular application of the Stone methodology wherein a received usage served as an example of what constituted fault, *see infra* note 59.

55. In *Langlois*, of all the vicinage articles, La. Civ. Code art. 669 (1870) was of greatest utility to the court; it provided:

> If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place.

Langlois v. Allied Chem. Corp., 249 So. 2d 133, 137 (La. 1971).

Affirming plaintiff's recovery, the supreme court held that Article 2315 imposed liability for damage caused by ultrahazardous activities—proof of negligence was not required. Employing the method advocated by Professor Stone to define fault, Justice Barham stated that "our lawmakers have provided us with numerous standards of fault in the Civil Code, in statutory law, and in ordinances. Fault is not limited to moral wrongs but encompasses many acts which are merely forbidden by law."[56] Justice Barham further remarked that "[t]he activities of man for which he may be liable without acting negligently are to be determined after a study of the law and customs. . . ."[57] Finding an applicable standard of conduct in the vicinage articles, albeit a standard of absolute obligation, the court held that liability for dangerous and hazardous activities flows from Louisiana Civil Code article 2315 by analogy with those articles.[58] In this way, Louisiana's ultrahazardous activity doctrine not only came into being as a delictual theory but also became synonymous with fault.[59]

V. UNITARY SOURCE OF DELICTUAL RESPONSIBILITY IN ARTICLE 2315

One might ask why the *Langlois* court thought it necessary that all delictual actions be ultimately traceable to a single source in Article 2315. Why not

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56. *Langlois*, 249 So. 2d at 137.

57. *Id.* at 140. In fact, Justice Barham indicated exactly how to proceed:

> [I]n the decision of a case in tort or delict in Louisiana, the court first goes to that fountainhead of responsibility, Articles 2315 and 2316, and in applying those articles it goes to many other articles in our Code as well as statutes and other laws . . . which courts may apply per se, impliedly or by analogy.

Id. at 137.

58. *Id.* at 139.

59. The Stone methodology has also been applied by the U.S. Fifth Circuit Court of Appeals. The case of *Grigsby v. Coastal Marine Service of Texas*, 412 F.2d 1011 (5th Cir. 1969) involved a wrongful death claim in admiralty. The court faced the question of whether Article 2315 (at the time Louisiana's death statute) would allow for damages based on a finding that defendant's sea going vessel was unseaworthy—a determination based on the condition of the vessel exclusive of any act or omission on the part of defendant. Defendant argued that Article 2315 required a showing of personal negligence. According to the court, it is the breach of a duty which defines fault, and that duty may be an absolute obligation thereby imposing strict liability on the breaching party. Recognizing that the Louisiana Civil Code did not impose a duty to prevent against unseaworthiness, the court reasoned that the maritime standard can be considered a received usage in Louisiana under Article 21 (now La. Civ. Code art. 4). It followed that the breach of the duty to ensure seaworthiness was an example of Article 2315 fault. Judge Wisdom stated: "[W]e agree, too, with the district court's view that because of Louisiana's commitment to civil law, Louisiana would be the last jurisdiction to put a narrow interpretation of fault that would rule out as an applicable standard the maritime principle of seaworthiness." *Id.* at 1028.

Noting that liability for unseaworthiness equates to strict liability and that the Louisiana Civil Code does not address liability for damages resulting from the unseaworthiness of a vessel, query if *Grigsby* could be justified independent of Articles 2315 and 2315.2 as it would have to be were those articles interpreted as requiring proof of negligence or intentional wrongdoing. Might Louisiana Civil Code article 4 serve as an independent source of tort responsibility? If it were, the strict liability common law torts (trespass and conversion) might be justified as prevailing usages and maintain an existence separate and apart from Louisiana Civil Code article 2315.

recognize other sources of tort responsibility independent of Article 2315 such as the vicinage articles? At the time of the *Langlois* decision, the vicinage articles collectively did not provide for damages.[60] In particular, Article 669, the provision of greatest application in *Langlois*, did not.[61] Prior to *Langlois* some courts did award damages under these articles exclusive of any connection with Article 2315. Many of these decisions characterized the vicinage articles, in particular Article 667, as creating a quasi-contractual action and awarded damages accordingly. Still others classified it as a delictual action.[62] In order to theoretically justify damages the vicinage articles had to be connected with Article 2315 which itself provided for damages upon a showing of fault. The supreme court in *Langlois* made this connection by employing the Stone methodology. A second reason for making a connection between the vicinage articles and Article 2315 was to classify these actions as *ex delicto* for procedural reasons, in particular, to determine the applicable liberative prescription period.[63] One benefit of attributing all delictual actions to Article 2315 was to provide for the heritability of these actions. Until 1986, Article 2315 provided for the heritability of delictual actions for injuries caused by offenses and quasi-offenses.[64] Clearly, this applied to actions arising from any of the articles within Chapter 2 "Of Offenses and Quasi Offenses," but what about the heritability of delictual actions arising from articles outside that chapter? Would Article 2315 apply to these as well? Classifying delictual actions arising from whatever source as an Article 2315 action avoided any potential problem.

VI. CIVILIAN METHODOLOGY APPLIED

The *Dual Drilling* court might have avoided ambiguity had it employed the Stone method as the supreme court did in *Langlois*. In doing so the court might have clarified what it meant by its statement: "tortious activity is only established upon proof of fault . . . as opposed to the common law allowance of strict liability."[65] The court might have indicated that a survey of the Louisiana Civil Code reveals no express imposition of strict liability for the protection of movables; therefore, negligence is the proper standard to be applied in determining fault.

For the sake of clarification, let us employ the Stone method in determining if the commission of what would be considered conversion at common law is an example of fault in Louisiana. The codal provisions governing movables are found in Title II of Book I, namely Chapters 1 through 4. We find therein the rules of accession of movables and the transfer of ownership of movables. Article 516

60. *See supra* notes 40 and 55.

61. *See supra* note 55.

62. Gulf Ins. Co. v. Employers Liab. Assurance Corp., 170 So. 2d 125, 127-28 (La. App. 4th Cir. 1964).

63. *Id.*

64. La. Civ. Code. art 2315.1 now provides for the heritability of delictual actions arising from an offense or quasi offense as a survival action.

65. *Dual Drilling Co.*, 721 So.2d at 857 n.3.

provides that "[o]ne who uses a movable of another, without his knowledge, for the making of a new thing may be liable for the payment of damages." In *Dual Drilling*, defendants did not make a new thing but instead caused damage to a thing. Arguably this provision and all of the provisions governing accession in relation to movables are inapplicable since they primarily regulate the transfer of ownership and ultimately seek to prevent unjust enrichment. Article 526 provides in part that "the owner of a thing is entitled to recover it from anyone who possess or detains it without right. . . ." This article presumes not only that the owner is not in possession but that the owner would be made whole by the return of the thing. Such was not the case in *Dual Drilling*. Similarly, the provisions relating to lost or stolen things (Articles 521, 524) contemplate a situation in which the rightful owner is out of possession, and the return of the thing will repair his damage. Ultimately, we may conclude that no statute expressly creates an absolute duty to guard against harming another's ownership or possessory interest in a movable.[66]

Finally, resorting to Article 4 we inquire into justice, reason, and prevailing usage. Are we willing to say that common law conversion is a prevailing usage in Louisiana? Even so, does justice require us to adopt such a strict standard, indifferent to any error or reasonable mistake? Perhaps not, for as the supreme court and Professor Yiannopoulos agree, movables are adequately protected without imposing strict liability.[67] Since the Louisiana Civil Code does not impose a greater standard of care than that generally required by Article 2315—namely, negligence as illustrated by analogy with Article 2316—the supreme court might have reached the same result but instead by reasoning that common law conversion is not viable in Louisiana since it imposes a higher standard of conduct than that required by the codal scheme.

VII. LOUISIANA'S DELICTUAL COUNTERPART TO COMMON LAW CONVERSION

A. Two Forms of Conversion

The *Dual Drilling* court cites with approval earlier Louisiana decisions describing the specific conduct that would result in a conversion, suggesting that this conduct is similarly descriptive of the corresponding Article 2315 delictual action.[68] The cited opinions each describe the characteristics of the common law

66. The *Dual Drilling* court stated that the existence of a conversion action may be inferred from these articles. However, the court did not utilize these articles to determine what constitutes fault when a person destroys another's movable property. *Dual Drilling Co.*, 721 So. 2d at 856 n.3.

67. *See supra* notes 8 and 23 and text accompanying notes 23-25.

68. The *Dual Drilling* court stated:

> A conversion is committed when any of the following occurs: 1) possession is acquired in an unauthorized manner; 2) the chattel is removed from one place to another with the intent to exercise control over it; 3) possession of the chattel is transferred without authority; 4) possession withheld from the owner or possessor; 5) the chattel is altered or destroyed; 6) the chattel is used improperly; or 7) ownership is asserted over the chattel.

Dual Drilling Co., 721 So. 2d at 857 (citing Importsales Inc. v. Lindeman, 92 So. 2d 574 (La. 1957); Louisiana State Bar Ass'n v. Hinrichs, 486 So. 2d 116 (La. 1986); and *Louisiana Tort Law* §1-2, at 3).

tort. Thus, the practical effect of *Dual Drilling* on conversion actions appears to be limited to altering only one aspect of common law conversion—the measure of intent. Previously a plaintiff had only to show that: 1) he owned the movable in question or had a possessory interest in it; 2) the defendant intended to manipulate the movable in the manner in which he did; and 3) the manipulation was *in fact* contrary to the plaintiff's ownership or possessory interest in the movable. Arguably, what must now be shown to recover in an action for conversion is that the defendant intentionally exercised dominion over a movable in a manner *knowingly* adverse to another's property interest. Arguably, the common law intentional tort of trespass will be similarly impacted by this decision since it shares common law conversion's strict liability feature. Yet, casting the change in terms of a minimum requirement of proof of *fault* (the court appears to mean a minimum requirement of negligence), the court in effect recognizes two forms of civil law conversion. One form is the aforementioned intentional tort. The second is a negligence-based tort in which movable property is damaged as a result of an unreasonable risk of harm created by the defendant. With two forms of conversion, one intentional another negligent, the allocation of fault in a comparative fault analysis will differ depending on which is proved.[69] Similarly, whether or not solidary liability is imposed will also depend to some extent on which tort is proved.[70]

B. Negligent Conversion

The delictual action based on negligence should require proof of negligence no different than that previously required in Louisiana. The courts may be expected to proceed by a duty/risk analysis in deciding whether the defendant should respond for the damage caused by his negligence.[71] It is interesting to note that the common law tort of conversion would not succeed on a showing of negligence alone.[72] Clearly, *Dual Drilling* allows for damages if a defendant acts negligently since fault undisputedly contemplates negligence.

C. Intentional Conversion and the Caudle *Measure of Intent*

Regarding Louisiana's intentional tort of conversion, it is not clear what measure of intent will be required. In order for the imposition of strict liability to be avoided, the requisite intent must be more than the mere volition to control

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69. La. Civ. Code art. 2323 provides in part: "Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced."

70. La. Civ. Code art. 2324 provides in part: "He who conspires with another person to commit an intentional tort or willful act is answerable, in solido, with that person, for the damage caused by such an act."

71. *See* Dixie Drive It Yourself System of New Orleans v. American Beverage Co., 137 So. 2d 298 (La. 1962); Hill v. Lundin & Associates, Inc., 256 So. 2d 620 (La. 1972).

72. Restatement (Second) of Torts §224 (1965).

movable property. The *Dual Drilling* court rejected this measure of intent as non-blameworthy, suggesting that a more focused intent is necessary—perhaps an intent directed at doing harm to another's possessory or ownership interest in a movable.[73] Clearly, if a defendant desires to permanently deny an owner the use of his property without permission or legal right, such would be considered a conversion in Louisiana. The intent is blameworthy in that it is a desire to injure the owner's property interest.[74] A less injurious intent is illustrated by the following example: The defendant desires to use a movable which he knows does not belong to him. The defendant accidentally damages the movable. The defendant did not desire the harmful consequences of his act but rather merely intended to use the movable without the owner's consent. Might the resulting damages be more properly considered the result of negligence? The Louisiana Supreme Court held to the contrary when it addressed this issue in the context of a battery claim in *Caudle v. Betts*.[75]

In *Caudle*, the court faced the question of whether an electrical shock administered to a worker by his employer's chief executive officer as a practical joke constituted an intentional tort.[76] The lower courts held that no intentional tort had been committed since the *resulting injury* was not intended nor reasonably foreseeable. The supreme court reversed, stating that the intention need not be malicious nor need it be an intention to inflict actual damage.[77] All that is necessary is that the actor intend to inflict either a harmful or offensive contact without the other's consent. The fact that *unforeseeable* injury occurred is irrelevant; the defendant must respond in damages for them.

If we apply the *Caudle* concept of intent to conversion, the minimum measure of intent necessary to establish conversion in Louisiana is not so blameworthy as desiring to damage another's movable, but rather an intent to act contrary to another's ownership or possessory *interest*. Thus, in the above example of our defendant who did not desire to harm the movable but nevertheless acted without the owner's consent, the act is an intentional conversion since the defendant acted

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73. The requirement that the intent element of an intentional tort constitute more than merely the intent to do the act is not a new concept in Louisiana. *See Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981) wherein the court, responding to plaintiff's proposition that intentional acts should be equated with voluntary acts, stated:

> The meaning of 'intent' is that a person who acts either (1) consciously desires the physical result of his acts, whatever the likelihood of that result happening from his conduct; or (2) knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to that result. Thus, intent has reference to the consequences of an act rather than to the act itself.

(citations omitted).

74. An intent desiring such consequences may be equated with intent to commit the crimes of theft and unauthorized use of a movable. *See* La. R.S. 14:67 (1999) and La. R.S. 14:68 (1999).

75. 512 So. 2d 389 (La. 1987).

76. *Id.* at 389. During a Christmas party defendant played a practical joke on plaintiff by shocking him with a charged automobile condenser. The shock delivered was slight, however, in the months following the incident, plaintiff experienced headaches and fainting spells. Surgery severing the occipital nerve was necessary to alleviate the headaches and fainting spells.

77. *Id.* at 391.

knowingly adverse to the owner's property interest. In fact, the holding of *Dual Drilling* supports this conclusion. In *Dual Drilling*, the court affirmed the trial court's finding that Southern knew or should have known that Rig 25 was not part of the sale. The supreme court affirmed the imposition of solidary liability but remanded the case for an allocation of fault between the defendants since the trial court, in applying the principles of strict liability, did not allocate fault.[78] Clearly, defendant's employees did not intend the harm that resulted from their acts. Nevertheless, the defendant's employees' conduct, coupled with their knowledge (or constructive knowledge) that their acts were contrary to another's ownership interest, constituted an intentional tort. Thus, the degree of intent held sufficient in *Dual Drilling* to impose solidary liability comports with that level of intent described in *Caudle v. Betts*.

By imposing the *Caudle* standard of intent as opposed to strict liability, the claim of reasonable mistake as to ownership serves as a defense to intentional conversion. Claims of reasonable mistake might also serve as a defense to conversion actions based on negligence. Consider a situation in which an actor is reasonably mistaken in believing another's property is his own and destroys it. Having exercised reasonable care, the court should conclude that the actor was not negligent. Furthermore, believing within reason that the movable was his, the actor lacks the *Caudle* standard of intent. In other words, the actor intended neither to *injure* the plaintiff's possessory or ownership interest nor even to *act contrary to* the plaintiff's interests. Having destroyed the movable, the actor can no longer return the movable as plaintiff would demand in a revendicatory action. The quasi-contractual action for unjust enrichment is equally unavailing since the actor has not been enriched by the movable's destruction. In this situation it can be said that the owner or possessor's interest in his movable is not completely protected. In contrast, a common law conversion action would have been successful in this case.

VIII. CONCLUSION

Despite the potential problems created by *Dual Drilling*, the supreme court should be applauded for several reasons. Their decision reflects a desire to "clean up" the delictual law of movables, a problem addressed by one Louisiana Supreme Court decision and several commentators.[79] The decision might also represent the court's acknowledgment of the legislative will so loudly expressed in the 1996 tort reform legislation that strict liability shall be imposed only in very limited situations.[80] Unfortunately, the court inadequately expressed its ruling. Had it explicated the civilian method advocated by Professor Stone and employed in *Langlois*, the court might have reached the same result while avoiding ambiguity.

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78. *Dual Drilling Co.*, 721 So. 2d at 859.

79. *See* Lincecum v. Smith, 290 So. 2d 904 (La. 1974); Robert L. Morris, Note, *Movable Property—Remedies of One Out of Possession of Movables*, 37 Tul. L. Rev. 843 (1963); A.N. Yiannopoulos, *Real Actions in Louisiana*, 25 La. L. Rev. 589 (1965); A.N. Yiannopoulos, Property §359, at 695, *in* 2 Louisiana Civil Law Treatise (3d ed. 1991 & Supp. 1999).

80. *See* La. Civ. Code art. 2: "Legislation is a solemn expression of legislative will."

One of the benefits of our Civil Code has been its adaptability to new and unforeseen situations. If *Dual Drilling* is read as limiting the concept of fault embodied in Article 2315, Louisiana suffers a loss of adaptability in the area of tort law. *Dual Drilling* should be read as a statement about conversion, not one altering the civilian concept of fault.

Mark Fernandez